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NEWSLETTER

Eleventh Circuit Finds the Term "Matter" Ambiguous As Applied Under Communications Liability Policy

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The United States Court of Appeals for the Eleventh Circuit has ruled that the term "matter" was ambiguous as applied under a communications liability policy. *Westport Ins. Corp. v. Tuskegee Newspapers, Inc.*, 2005 WL 580520 (11th Cir. Mar. 14, 2005).

The policyholder, a publisher, was sued for failing to publish three notices of foreclosure in weekly editions of its Alabama-based newspaper after receiving orders to print the notices. The publisher sought indemnification from its insurer under a communications liability policy. The policy contained both a communications liability provision and an E&O provision. The communications liability provision provided coverage for liability arising out of defamation, disparagement and other torts "committed in the utterance or dissemination of matter by or with the permission of the named insured...in the named publication(s) and in any advertising of the same publication(s)." The E&O provision extended coverage "to include any negligent error, omission, misstatement or misleading statement by or with the permission of the named insured...in matter which is uttered or disseminated during the policy period." The policy did not define the term "matter." The insurer argued that "matter" should be construed identically under both the policy's communications liability provision and its E&O provision, and that "matter" necessarily meant content physically printed in the policyholder's newspaper.

The court concluded that a "perfectly reasonable" reading of "matter" was to read the term "in the particular context in which it is used...each time it is used." The court rejected the insurer's contention that identical interpretations of the term across policy provisions were required by the principle that an agreement "be construed in its entirety," noting that the policy's communications and E&O provisions had differing purposes—to insure against damages arising from information missing from the publisher's newspaper (E&O provision), and to guard against liability arising from information appearing in the newspaper (communications liability provision).

The court also declined to adopt the insurer's proffered meaning for "matter," which it paraphrased as "any material actually printed." First, the court questioned whether a definition of "matter" as "material actually printed" would be consistent with the meaning and purpose of policy coverage for "omissions." Second, the court reasoned that the policy's communications liability provision, with its allowance of coverage for material

"in any advertising of the same publication(s)," would be rendered redundant if matter were read to mean "any material actually printed." The court noted that "any material printed" would impliedly include "advertising." Third, the court noted that the insurer's proffered definition of "matter" would create anomalous outcomes under the facts presented: the publisher could receive coverage if it included a partial "printing" of the foreclosure notices at issue but failed to include all relevant foreclosure information, such as time and date; conversely, the publisher would not receive coverage if it failed to make any mention of the foreclosure, as under the facts presented. Last, the court concluded that the policy was susceptible to a determination of coverage under the E&O provision even under the insurer's proffered definition of "matter," insofar as "material actually printed" could be read to mean the section of the newspaper in which foreclosures normally appear.

Describing "matter" as an "inherently flexible and imprecise term," the court also offered two alternative definitions of "matter." The court concluded that "matter" could be "reasonably read" to refer to "any matter uttered or disseminated by" the publisher under the policy's E&O liability provision, noting that "matter" was modified by the phrase "in the named publication(s)" in the policy's communications liability provision, but that the same modifying phrase did not appear in the policy's E&O provision. Citing *Webster's*, the court also proffered an alternative, "specific common meaning" for "matter: ... something written or printed." Applying this definition, the court concluded that the policy's E&O provision allowed for coverage under a "reasonable reading" of that provision.

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